

DOCKET FILE COPY ORIGINAL

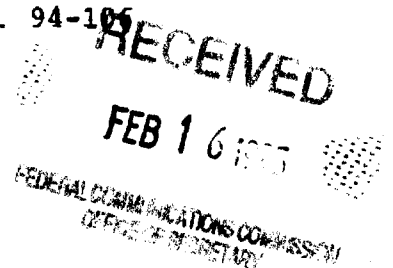
ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition of the Connecticut
Department of Public Utility
Control to Retain Regulatory
Control of the Rates of
Wholesale Cellular Service
Providers in the State of
Connecticut)

PR Docket No. 94-105



APPLICATION FOR REVIEW

The undersigned, Connecticut Telephone and Communications Systems, Inc., Connecticut Mobilecom, Inc., and Smart Cellular, Inc., comprising the Connecticut Cellular Resellers Coalition ("Resellers"), respectfully submit this Application For Review, pursuant to 47 C.F.R § 0.459(g), of the Order adopted and released by the Commission on February 9, 1995, Order, DA 95-208 (February 9, 1995) ("Order"). Although the Resellers did not submit a request for confidentiality in this matter, they were a party to the proceedings before the Connecticut Department of Public Utility Control ("CDPUC") and, moreover, their rights and interests will be affected by whatever action the Commission takes in regard to the petition submitted by the State of Connecticut ("Petition").

In particular, the Resellers seek review of the Commission's order deleting from its files certain documents submitted in support of the Petition. Those documents are set forth in Section 3 of Appendix A of the Order. All of the documents should be included in the Commission's files, should be

No. of Copies rec'd 024
List A B C D E

considered in the Commission's decision on the merits and should be disclosed subject to the Protective Order in Appendix B of the First Confidentiality Order.

There are several reasons why the Commission should review and modify the Order. First, the Commission has reached erroneous factual conclusions. Second, the materials deleted by the Order are subject to confidential treatment on their face and, moreover, are relevant to the issues before the Commission. Finally, the Commission file as presently constituted by the Order presents an unbalanced view of the proceedings before the CDPUC.

1. The Reseller's Brief.

The Commission determined that because the Resellers did not sign the Connecticut protective order, their brief would be deleted from the file. (Order at 10 n.44.) The factual predicate to the Commission's determination is in error. The Resellers were represented before the CDPUC by Attorneys Paul E. Knag and Joseph R. Mazzarella, of the law firm of Cummings & Lockwood. The Connecticut protective order was signed by those attorneys, rather than principals of the Resellers, for the simple reason that the Resellers were not entitled to view the confidential information being provided by Springwich, Metro Mobile, and Litchfield.

The first three paragraphs of the Connecticut protective order set forth the scope of the information to be protected. Paragraph 4 then lists those persons entitled to

receive the confidential information submitted. Included in that list is: "Paul E. Knag (as outside counsel to the Connecticut Resellers Coalition) of Cummings & Lockwood" Paragraph 4 goes on to provide that "Confidential Information may not be provided or disclosed in any manner by the Department or any Recipient to any individual with operational responsibilities at any party or intervenor or to anyone else whatsoever except those designated as permissible Recipients hereunder." (Emphasis added.)

Because none of the Resellers themselves were to provide or receive confidential information under the Connecticut protective order, it is perfectly logical that none of them were signatories to that agreement. The Resellers were, however, a party to the CDPUC proceedings and were represented by counsel (Knag and Mazzarella) who had a need to know what confidential information was being supplied. Thus, rather than being classed as "Recipients" under the Connecticut protective order, attorneys Knag and Mazzarella were listed as "Parties" (along with outside counsel to Springwich), but more specifically as members of Cummings & Lockwood, because the Resellers were not entitled to receive the confidential information submitted to the CDPUC.

Thus, far from being a party "that did not agree to the protected disclosure process below," (Order at 10 n.44), the individual Resellers were precluded from ever receiving any confidential information. They did agree, however, to abide by the Connecticut protective order through their attorneys' promise

not to divulge the confidential information divulged to them. Under these facts, the Order is clearly incorrect in asserting that the Reseller's brief was a document submitted by a party who did not sign the Connecticut protective order. On this basis, the Resellers request that the Commission accept their Brief into the record in this proceeding.

2. The Order Is Contrary To The Commission's Rules.

In ruling that certain documents would be deleted from the file, the Order relies on 47 C.F.R. §§ 0.457(d)(2)(i), 0.459(a) and 0.459(b). (Order at 9, paragraph 14.) The Order then rejects selected documents for one or more reasons derived from the "justification" and "confidentiality" requirements of those regulations. The Order concludes that the Commission cannot "comb through supposedly confidential and germane documents page by page, or paragraph by paragraph, to construct the petitioner's showing of relevance to particular contentions in its petition, and related demonstrations of confidential status and prospects of competitive harm." (Order at 10, paragraph 15.) Such an inquiry is not, however, required by the FCC's Rules.

The Commission's regulations provide that unless information is entitled to automatic protection under 47 C.F.R. § 0.457(d)(1), a person submitting what they term confidential information should submit a request for non-disclosure pursuant to § 0.459. In order to have their request granted, that person must do three things:

1. Show that the materials contain trade secrets or commercial, financial or technical data which would customarily be guarded from competitors (47 C.F.R. § 0.457(d)(i));
2. Attach a copy of the request for confidentiality to the materials to which it applies (47 C.F.R. § 0.459(a); and
3. State the reasons for withholding the materials from inspection and the facts upon which those reasons are based (47 C.F.R. § 0.459(b).

The regulations do not require the Commission to examine the materials submitted "page by page" or "paragraph by paragraph." Nor do they require the person making the request to "explicitly identify the segments arguably warranting confidential treatment." (Order at 9-10, paragraph 14.) Nor do the regulations require, in this case, that the CDPUC "show to what extent Connecticut may have relied on the submitted materials in its petition" (Order at 10, paragraph 14.) Rather, the regulations require that a request be granted if the three steps listed above are taken and "it presents by a preponderance of the evidence a case for non-disclosure consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552." (47 C.F.R. § 0.459(d).

In this case, the Commission has erected procedural hurdles not contemplated by its regulations. The CDPUC determined in the course of its extensive proceeding that the material identified in Appendix A, Section 3 of the Order should be subject to the terms of the Protective Order adopted in CDPUC Docket No. 94-03-27. Although the FCC in this proceeding has adopted the CDPUC's Protective Order to govern confidential

material (See Order, DA 95-111, January 25, 1995 at para. 40), it has visited de novo in the Order the question of which Docket material should fall within the scope of the Protective Order, and has accorded the CDPUC's judgments no deference. In the Resellers' view, the CDPUC's determinations in this respect in fact satisfy the requirements of Section 0.459 of the Rules. The Bureau's application of a higher and different standard than that articulated in the Rules thus should be reversed.

3. The Order Does Not Provide A Balanced View Of The Issues Involved.

The Bureau's decision to accept certain material from CDPUC Docket No. 94-03-27 but exclude other material will in any event result in an imbalanced and incomplete record in this proceeding. In particular, the CDPUC's decision in Docket No. 94-03-27, and its submission of its Petition, was based upon the entire record of the CDPUC Docket. Exclusion, for example, of the Resellers' Brief in Docket No. 94-03-27 from the record here will unfairly imbalance the FCC's ability to assess the merits of the CDPUC Petition. To this end, the Resellers represent small businesses with a unique perspective, whose views are not adequately addressed by the other briefing parties in Docket No. 94-03-27.

Moreover, exclusion of selected material from Docket No. 94-03-27 more generally will ensure an incomplete and inaccurate record in this proceeding, which, in turn, will disserve the public interest. The CDPUC's decision was based upon the full record of that Docket and can only be fully

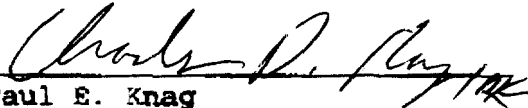
understood and evaluated in light of the complete record. The exclusion of selected material from the record will only ensure that the FCC does not have the benefit of a complete record here.

4. Conclusion.

For all of the foregoing reasons, the Commission should review and modify the Order.

Respectfully Submitted,

CONNECTICUT TELEPHONE AND
COMMUNICATIONS SYSTEMS, INC. and
CONNECTICUT MOBILECOM, INC.
BY CUMMINGS & LOCKWOOD
THEIR ATTORNEYS

By 

Paul E. Knag
Charles D. Ray
CityPlace I
Hartford, CT 06103
(203) 275-6700

OF COUNSEL:
Robert B. Kelly
Kelly & Povich, P.C.
Suite 300
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 342-0460

CERTIFICATE OF SERVICE

I, Charles D. Ray, hereby certify that a copy of the foregoing Application for Review was mailed, postage prepaid, this 16th day of February, 1995 to the following parties:

Alan R. Shark, President
American Mobile Telecommunications Association Inc.
1150 8th St., N.W., Suite 250
Washington, D.C. 20036

Phillip Rosario, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
One Central Park Plaza
New Britain, CT 06051

Mark G. Kohler, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
One Central Park Plaza
New Britain, CT 06051

James T. Scott, III, Esq.
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
Bell Atlantic Metro Mobile Companies

Michael F. Altschul, Esq.
Cellular Telecommunications Industry Association
Suite 200
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Reginald J. Smith, Chairman
Connecticut Department of Public Utility Control
One Central Park Plaza
New Britain, CT 06051

Valerie J. Bryan, Esq.
Connecticut Office of Consumer Counsel
State of Connecticut
Suite 501
136 Main Street
New Britain, CT 06051

Scott K. Morris
McCaw Cellular Communications, Inc.
5400 Carillon Point
Kirkland, Washington 98033

Mark J. Golden, Acting President
Personal Communications Industry Association
Suite 1100
1019 Nineteenth Street, N.W.
Washington, D.C. 20046

Jean L. Kiddoo, Esq.
Swidler & Berlin
Suite 300
3000 K Street, N.W.
Washington, D.C. 20007-5116
Springwich Cellular Limited Partnership

Elizabeth R. Sachs
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
American Mobile Telecommunications Association

Thomas Gutierrez, Esq.
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 19th Street, N.W.
Suite 1200
Washington, D.C. 20036
Mobile Telecommunication Technologies Corp.

Joel H. Levy, Esq.
Cohn and Marks
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
National Cellular Resellers Association

Judith St. Ledger-Roty, Esq.
Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036
Paging Network, Inc. (PageNet)

Leonard J. Kennedy, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037
Nextel Communications, Inc.

Russell H. Fox, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
E.F. Johnson Company

Douglas B. McFadden, Esq.
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
GTE Service Corporation

Howard J. Symons, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington D.C. 20004
McCaw Cellular Communications, Inc.


Charles D. Ray

R411071.DOC 02/16/95